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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

NICHOLAS C. SMITH-WASHINGTON,
JOYCE MAHONEY, JONATHAN AMES,
and JENNY LEWIS on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

TAXACT, INC.,

Defendant.

Case No. 3:23-CV-00830-VC
Assigned to Hon. Vince Chhabria

**SECOND UPDATED JOINT CASE
MANAGEMENT STATEMENT**

Amended Complaint Filed June 20, 2023
Case Management Conf.: June 30, 2023 at
10:00 a.m.

The Parties to the above-captioned action (the “Action”) jointly submit this Second Updated Joint Case Management Statement in accordance with the Court’s Order directing the parties to file a proposed schedule that includes actual dates prior to the June 30, 2023 Case Management Conference (ECF 63).

1. Jurisdiction and Service

Plaintiff Smith-Washington filed a complaint in Alameda Superior Court on January 23, 2023. Defendant removed the action on February 23, 2023. This Court has diversity jurisdiction over this Action under 28 U.S.C. §1332(a) and jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A) (“Class Action Fairness Act” or “CAFA”). All parties have been served. On June 20, 2023, Plaintiffs filed an Amended Complaint that added three new putative class representatives, a nationwide class and two subclasses, new factual allegations regarding different online tracking tools, and three new causes of action.

On May 25, 2023, this Court Denied Defendant’s Motion to stay this Action pursuant to the FAA (ECF No. 12) without prejudice. (ECF No. 44.) Defendant filed a Motion to Compel Arbitration and Stay Proceedings (“Motion to Compel Arbitration”) on June 9, 2023 (ECF No. 50), and anticipate filing a renewed Motion to Compel Arbitration and Stay Proceedings in light of the allegations in the Amended Complaint. At this time, the Parties do not anticipate joining any additional parties other than those included in the Amended Complaint.

2. Facts

Plaintiffs are California residents who allegedly used TaxAct’s website to prepare and file their federal and state income tax returns, or whose spouse prepared and filed their returns, during various period between approximately 2005 and 2022. Defendant is a tax preparation software and services company based in Dallas, Texas, which assists taxpayers in preparing and filing their federal and state tax returns. Plaintiffs brings this case on behalf of themselves and all natural persons residing in the United States (including subclasses for California Filers, Married Nationwide Filers, and Married California Filers) who used Defendant’s website’s tax preparation services to prepare a tax return (hereinafter “Class Members”) on or prior to November 23, 2022 (the “Class Period”).

1 Plaintiffs' Statement:

2 Plaintiffs bring this class action case against TaxAct on their behalf and on behalf of others
3 who are similarly situated based on allegations that Defendant, one of the largest tax preparation
4 companies in the United States with revenues of \$227 million and 3.2 million consumer tax e-filings
5 in 2021 alone, secretly transmitted and assisted a third party in intercepting its users' confidential
6 personal and financial information with Meta Platforms, Inc. (formerly known as Facebook),
7 Google, and Google Double Click- who were all unauthorized third parties. Plaintiffs believe that
8 the Google Pixel and the Google Double Click Pixels were added to Defendant's website as early as
9 2010. TaxAct unlawfully disclosed Plaintiffs and Class Members' extremely private, confidential
10 and personal information including their personal identifiers (including IP Addresses, Facebook IDs,
11 names and phone number), along with their adjusted gross income, filing status, names of
12 dependents, x and the amount of any refund. TaxAct users were shown no disclaimer or warning that
13 their confidential information would be disclosed to any unauthorized third party, were never
14 advised that Defendants would aid an unauthorized third party in intercepting their confidential
15 information, had no idea that their confidential information was being collected and transmitted to an
16 unauthorized third party, and never consented to TaxAct's conduct. Plaintiffs allege that these
17 disclosures continued until at least November 23, 2022, when a nonprofit newsroom contacted
18 TaxAct for comments on a soon-to-be-published article regarding its use of tracking tools that are
19 the subject of this litigation.

20 Defendant's Statement:

21 Defendant relies on various third parties to support its business intelligence, marketing, and
22 advertising operations, including Meta Platforms, Inc. ("Meta"), Google, and Google Double Click.
23 Meta has developed and made available to website operators the Meta Pixel (formerly known as the
24 Facebook Pixel)—an analytics tool—which Defendant deployed on its website beginning in relevant
25 part in January 2018 to make permissible use of a limited subset of data collected from customers of
26 its software and services and visitors to its website. Google and Google Double Click also offered
27 pixels which Defendant utilized beginning in relevant part in January 2018. Defendant maintains
28 that, consistent with common industry practices and as described in the publicly available TaxAct

1 Privacy Notice, its use of online tools such as pixels and cookies was permissible under the law.

2 Defendant's Terms of Service and License Agreement (the "Terms") contain a clause
3 providing that disputes will be resolved solely through individual arbitration (the "Arbitration
4 Agreement"). The Terms are publicly available and hyperlinked on every page of the TaxAct
5 website, and a customer must agree to the Terms in order to use TaxAct's software. The Arbitration
6 Agreement incorporates by reference the JAMS Streamlined Arbitration Rules and Procedures (the
7 "JAMS Rules"). TaxAct provided to Plaintiffs' counsel and disclosed to this Court evidence of
8 agreement to the Terms by using TaxAct Services, as well as evidence of additional
9 acknowledgment of the terms at account creation, account sign in, and tax return filing for the
10 relevant period.

11 **3. Legal Issues**

12 Plaintiffs' Position:

13 Plaintiffs contend that Defendant's actions constitute an extreme invasion of Plaintiffs' and
14 putative class members' privacy, and violated common law, the California Constitution, and
15 numerous state statutes. The Complaint asserts claims for (1) common law invasion of privacy
16 through intrusion into private matters; (2) violation of Art. 1, § 1 of the California Constitution; (3)
17 violation of California Business and Professions Code § 17530.5 et seq.; (4) violation of California
18 Tax Preparation Act, Business & Professions Code § 22250 et seq.; (5) violation of California Civil
19 Code § 1799 et seq. (in the alternative); (6) Violation of the Electronic Communications Privacy
20 Act, 18 U.S.C. § 2510, et seq.; (7) violation of California Invasion of Privacy Act (CIPA),
21 California Penal Code § 630 et seq.; (8) violation of the Comprehensive Computer Data Access and
22 Fraud Act (CDAFA), Penal Code § 502; (9) violation of California Penal Code §§ 484 and 496; and
23 (10) violation of California Business & Professions Code § 17200 (UCL).

24 Plaintiffs allege on their own behalf and on behalf of Class Members that they have
25 asserted valid and actionable claims regarding Defendant's unlawful conduct as set forth in the
26 Complaint, including Defendant's unlawful disclosure and assistance in allowing Meta, Google and
27 Google Double Click to intercept their data without their notice or authorization. Plaintiffs allege
28 that Plaintiffs and Class Members never authorized Defendant's unlawful sharing of their

1 information and that Defendant's Privacy Policy and its Terms of Service & Terms of Use do not
2 serve as a means to justify or provide a defense to this unlawful conduct. Additionally, the Married
3 Filers California Class and the Married Filers nationwide class were not the ones who filed the joint
4 taxes or set up the accounts with Defendant and, therefore, did not have any occasion to see or agree
5 to the terms and conditions or any arbitration agreement.

6 Plaintiffs' and Class Members' claims are appropriate for class treatment under Federal Rule
7 of Civil Procedure 23. Plaintiffs Complaint seeks to create the following classes of Plaintiffs: (a) The
8 Nationwide Class; (b) The California Subclass; (c) The Married Filers Subclass; and (d) The Married
9 Filers California Subclass. Plaintiffs' allegations are common to all of the Class Members as those
10 members who utilized Defendant's services all were subject to the violations set forth in the
11 complaint associated with the disclosure and interception of their confidential personal information.
12 Plaintiffs' allege that they and Class Members (with the exception of the Married Filers California
13 Subclass and the Married Filers Class whose spouses filled out the documents) filled out standard
14 information in a tax return (despite customers filling in different amounts all users are entering data
15 into standardized government-issued forms), all of which is confidential and not information that
16 they were notified would be revealed without their authorization (and they did not affirmatively
17 authorize such disclosures). Similarly, Plaintiffs' and Class Members who file electronically as well
18 as those who may fill out their forms online and choose to print them out are all subject to the
19 unlawful disclosure and interception of their information through the use of the Meta Pixel and
20 Google and Google Double Click pixels that Defendant installed -- there is no known distinction in
21 how their data is collected based on the way the filing is ultimately submitted. Additionally,
22 Plaintiffs allege that there are no concerns regarding differences in individuals' knowledge. Here
23 there were no disclosures or disclaimers of any kind that would have notified Plaintiffs or Class
24 Members about Defendant's unlawful and unauthorized disclosure or about Defendant's assistance in
25 the interception of their confidential information. Instead, Defendant's disclosures confirmed what a
26 reasonable consumer would understand about a tax preparer's use of their data- that it would be kept
27 confidential and only used for the intended purpose of preparing their tax returns.

28 Defendant's Position:

1 Defendant believes that Plaintiffs agreed to arbitrate any claims on an individual basis, as set
2 forth in the TaxAct Terms and JAMS Rules. Further, Defendant denies and disputes each of
3 Plaintiffs' claims. Defendant used the Meta Pixel and other online tools consistent with standard
4 business practices for organizations operating online and in compliance with Treasury regulations.
5 Additionally, Defendant acted in a manner that is consistent with its Privacy Policy and its Terms.
6 Additionally, Defendant believes that Plaintiffs have not established standing, and that Plaintiffs'
7 claims are not amenable to class treatment under Federal Rule of Civil Procedure 23.

8 **4. Motions**

9 **A. Prior Motions**

10 Plaintiff filed an Administrative Motion to Strike, or in the Alternative, for Leave to File a
11 Surreply to TaxAct's Motion to Stay Under 9 U.S.C. § 3 (ECF No. 34). The Court did not grant
12 Plaintiffs' Motion to Strike, but granted Plaintiff Leave to File a Surreply.

13 Defendant's Motion to Stay Under 9 U.S.C. § 3 (ECF No. 12) was heard on May 25, 2023,
14 and was denied without prejudice. (ECF No. 44.) The Court ruled that Plaintiff may commence with
15 discovery in this matter. (ECF No. 44.)

16 **B. Pending Motions**

17 Defendant filed a Motion to Compel Arbitration and Stay Proceedings on June 9, 2023. (ECF
18 No. 50.) Although Defendant's Motion is scheduled for hearing on July 20, 2023 at 10:00 a.m., the
19 parties have stipulated to vacate the hearing date in light of Plaintiffs' filing of an Amended
20 Complaint that adds three new putative class representatives and new allegations. (ECF No. 55.) The
21 parties also stipulated, in the alternative, that if the Court does not vacate the hearing date before
22 Plaintiffs' Opposition is due, to continue the hearing date to August 10, 2023 and to continue the
23 opposition due date for an additional two weeks. On June 21, 2023, the Court granted the stipulation
24 as modified. (ECF No. 57.) Given that the pending Motion to Compel Arbitration and Stay
25 Proceedings was based on the prior complaint, the Parties agree that it has been mooted by the
26 Amended Complaint and that the hearing date should be vacated.

27 **C. Anticipated Future Motions**

28 Plaintiffs anticipate filing a motion for class certification.

1 Defendant anticipates filing a new Motion to Compel Arbitration and Stay Proceedings,
2 which will address the allegations in the Amended Complaint. If the Court does not grant
3 Defendant's anticipated Motion to Compel Arbitration and Stay Proceedings, Defendant anticipates
4 filing dispositive motions.

5 The Parties reserve the right to file further motions to compel discovery, if necessary, as well
6 as motions in limine, and other motions for miscellaneous relief at a later date.

7
8 **5. Amendment of Pleadings**

9 Defendant proposes a deadline of 60 days after the Initial Case Management Conference for
10 Plaintiffs to move for leave to amend the Complaint.

11 Plaintiffs filed a First Amended Complaint on June 20, 2023. Plaintiffs propose a deadline of
12 6 months after the Initial Case Management Conference for Plaintiffs to move for leave to amend the
13 Complaint again, if necessary, given the size of this case and the possibility that additional
14 information may be revealed during discovery that may warrant an additional amendment to the
15 Complaint.

16 **6. Evidence of Preservation Report**

17 The Parties have reviewed the Guidelines Relating to the Discovery of Electronically Stored
18 Information ("ESI Guidelines") and have met and conferred pursuant to Federal Rule of Civil
19 Procedure 26(f) regarding reasonable and proportionate steps to comply with their obligations to
20 preserve evidence relevant to the issues reasonably evident in this action.

21 The Parties will meet and confer, as needed, regarding any particular requests for
22 electronically stored information and any concerns relating to those requests, including their scope,
23 burden, and/or production format, following Plaintiffs' issuance of discovery. Defendant's counsel
24 shared with Plaintiffs' counsel that Defendant has instituted a Litigation Hold and did so in
25 November 2022. Defendant continues to supplement the Litigation Hold as appropriate.

26 **7. Disclosures**

27 The Parties propose that initial disclosures pursuant to Federal Rule of Civil Procedure 26(f)
28 be due thirty (30) days after the ruling on Defendant's anticipated Motion to Compel Arbitration and

1 Stay Proceedings. If that anticipated motion is not filed, Plaintiff requests that initial disclosure be
2 due within 30 days following the Initial CMC.

3 **8. Discovery**

4 To date, no discovery has been taken in this action. Following the Court's denial of
5 Defendant's Motion to Stay on May 25, 2023, the Court allowed Plaintiff to begin discovery. (ECF
6 No. 44.) Plaintiffs intend to begin discovery after filing the Amended Complaint.

7 Nevertheless, the Parties have met and conferred regarding an appropriate schedule for fact
8 discovery and jointly propose that the Court enter the schedule outlined below in Section 16.

9 Scope of Anticipated Discovery: Plaintiffs plans to begin serving formal discovery. Plaintiffs
10 believe it is too early to identify any potential discovery disputes.

11 Given Defendant's anticipated Motion to Compel Arbitration and Stay Proceedings,
12 Defendant believes that initial discovery should be limited to documents and testimony pertaining to
13 the arbitration agreement entered into between the Parties. If Defendant's anticipated Motion to
14 Compel Arbitration and Stay Proceedings to stay is denied, Defendant anticipates seeking discovery
15 on issues pertaining to whether this case can proceed as a class action, including whether Plaintiffs'
16 claims are representative of and common to the claims of putative class members; whether the class
17 is ascertainable; whether a class trial would be manageable; and whether individual issues
18 predominate. Defendant also anticipates seeking discovery as to whether Plaintiffs have factual
19 support for any and all allegations set forth in the Complaint, whether Plaintiffs can satisfy the
20 essential elements of the causes of action set forth in the Complaint, and if this case proceeds as a
21 class action, whether Plaintiffs and putative Class Members, have suffered any damage as a result of
22 TaxAct's alleged conduct. Defendant intends to take the depositions of Plaintiffs as well as any
23 experts Plaintiffs may put forth. Defendants will also seek any communications Plaintiffs had with,
24 or regarding, Defendant.

25 Modifications to Discovery Rules: The Parties do not think deviation from the rules set forth
26 in the Federal Rules of Civil Procedure is needed at this time. The Parties reserve the right to seek
27 relief for depositions and written discovery requests beyond the limits imposed by the Federal Rules
28 of Civil Procedure for good cause shown.

1 Electronically Stored Information: The Parties are considering entering into a stipulated e-
2 discovery order.

3 Discovery Disputes: The Parties will meet and confer in an effort to arrive at a stipulated
4 resolution of any disputes and/or narrow any disputed issues prior to presenting them to the Court for
5 resolution.

6 **9. Class Action**

7 The parties proposed briefing schedule for class certification is contained in Section 16.

8 Defendant believes that this action should be stayed. Plaintiffs believe that this action should
9 go forward and should not be stayed consistent with the Court's recent denial of Defendant's initial
10 Motion to Stay Under 9 U.S.C. § 3. Plaintiffs are prepared to address class certification issues as set
11 forth below. However, if Defendant files a renewed Motion to Compel Arbitration and Stay
12 Proceedings, the Parties agree that any proposal for class certification should be considered only
13 after the ruling on Defendant's renewed motion.

14 Plaintiffs have reviewed the Procedural Guidance for Class Action Settlements and are
15 prepared to discuss settlement. Defendant has reviewed the Procedural Guidance for Class Action
16 Settlements and is prepared to proceed with arbitration.

17 **10. Related Cases**

18 The Parties are not currently aware of any cases or proceedings that are "related" within the
19 meaning of Civil Local Rule 3-12(a).

20 **11. Relief**

21 As set forth in his Complaint, Plaintiffs seeks to recover actual damages, statutory damages,
22 restitution, disgorgement, statutory penalties, attorneys' fees and costs, and other relief as this Court
23 deems just and proper. Until discovery is completed, and the scope of the class damages are clear,
24 Plaintiffs cannot set forth with precision his or the Class's actual damages.

25 **12. Settlement and ADR**

26 Plaintiffs maintain that Plaintiffs did not agree to arbitrate this dispute for the reasons set
27 forth in its Opposition to Defendant's Motion to Stay including that Plaintiffs are not subject to an
28 arbitration agreement, including Married Filers who did not even see any terms or conditions, and

1 that even if they were the arbitration agreement is both substantively and procedurally unenforceable
2 and doesn't apply to this matter. The court denied Defendant's initial motion to arbitrate without
3 prejudice and Plaintiffs believe that the court's ruling should stand.

4 Defendant maintains that the Parties agreed to arbitrate this dispute and intends to file a
5 renewed Motion to Compel Arbitration and Stay Proceedings. Plaintiffs are prepared to consider
6 ADR options at this time. If Defendant's anticipated Motion to Compel Arbitration and Stay
7 Proceedings is denied, Defendant will consider ADR options at that time.

8 **13. Other References**

9 This case is not suitable for reference to a special master or the Judicial Panel on Multidistrict
10 Litigation.

11 **14. Narrowing of Issues**

12 Plaintiffs' Position:

13 At this time, it is unknown what agreements, motions or procedures would aid the parties in
14 narrowing the issues to be tried in this action. Plaintiffs believe that the issue of arbitration was fully
15 briefed, that the Court's denial was proper, and that the parties should work together to streamline
16 the litigation of this matter by reaching agreements wherever possible to ensure the most expeditious
17 litigation of this matter.

18 Defendant's Position:

19 The most consequential immediate issue is whether the Parties agreed to arbitrate the dispute,
20 including whether the Parties delegated that question to the arbitrator. Should the Court not grant
21 Defendant's anticipated Motion to Compel Arbitration and Stay Proceedings, further issues include
22 damages, standing, class certification, and the substantive issues of the allegations.

23 **15. Expedited Trial Procedure**

24 The parties do not believe this case is appropriate for an expedited trial procedure and will
25 not seek an expedited trial.

26 ///

16. Scheduling

Event	Parties' Initial Positions (Joint Except Where Noted)	Plaintiffs' Position	Defendant's Positions
Initial Disclosures	30 days after ruling on anticipated Motion to Compel Arbitration and Stay Proceedings, if motion is denied	December 11, 2023	October 13, 2023
Last Day to Amend Pleadings	<u>Plaintiffs' Position:</u> 6 months after ruling on the anticipated Motion to Compel Arbitration and Stay Proceedings <u>Defendant's Position:</u> 60 days after initial case management conference	May 10, 2024	August 29, 2023
Case Management Conference Before Close of Fact Discovery			March 25, 2024
Non-Expert Fact Discovery Cut-Off	260 days before trial, if the anticipated Motion to Compel Arbitration and Stay Proceedings is denied	October 10, 2023	April 22, 2024
Expert Disclosures (Initial)	240 days before trial, if the anticipated Motion to Compel Arbitration and Stay Proceedings is denied	October 30, 2023	May 13, 2024
Expert Disclosures (Rebuttal)	220 days before trial, if the anticipated Motion to Compel Arbitration and Stay Proceedings is denied	November 17, 2023	May 27, 2024
Expert Fact Discovery Cut-Off	190 days before trial, if the anticipated Motion to Compel Arbitration and Stay Proceedings is denied	December 18, 2023	June 10, 2024
Deadline for Plaintiffs to File Class	175 days before trial, if the anticipated Motion to Compel Arbitration and Stay Proceedings is	January 3, 2024	October 30, 2023

Event	Parties' Initial Positions (Joint Except Where Noted)	Plaintiffs' Position	Defendant's Positions
Certification Motion	denied		
Deadline for Defendant to file opposition to Plaintiffs' class certification motion	160 days before trial, if the anticipated Motion to Compel Arbitration and Stay Proceedings is denied	January 26, 2024	November 17, 2023
Deadline for Plaintiffs to file reply in support of motion for class certification	150 days before trial, if the anticipated Motion to Compel Arbitration and Stay Proceedings is denied	January 26, 2024	December 1, 2023
Hearing on Plaintiffs' motion for class certification	130 days before trial, if the anticipated Motion to Compel Arbitration and Stay Proceedings is denied	February 15, 2024	December 21, 2023
Further scheduling conference	130 days before trial, if the anticipated Motion to Compel Arbitration and Stay Proceedings is denied	February 15, 2024	May 6, 2024
Last Date to File Dispositive Motion	75 days before trial, if the anticipated Motion to Compel Arbitration and Stay Proceedings is denied	April 10, 2024	June 20, 2024
Date for Pretrial Conference	14 days before trial, if the anticipated Motion to Compel Arbitration and Stay Proceedings is denied	June 10, 2024	August 5, 2024
Trial	485 days (approximately 16 anticipated months) after the complaint was filed, if the Motion to Compel Arbitration and Stay Proceedings is denied	June 24, 2024 at 10:00 a.m.	August 19, 2024

17. Trial

Plaintiffs' Position: Plaintiffs have requested a jury trial. The length of trial will depend upon whether or not a class is certified. Accordingly, Plaintiffs propose deferring any trial setting until after Plaintiffs' class certification motion has been decided.

Defendant's Position: Defendant believes that, at this time, it is premature to provide an accurate estimate of the length of the expected trial.

18. Disclosure of Non-Party Interested Entities or Persons

Plaintiffs have not filed the "Certification of Interested Entities or Persons" required by Civil Local Rule 3-15 but has no interested entities or persons to disclose.

Defendant has filed the "Certification of Interested Entities or Persons" required by Civil Local Rule 3-15. ECF No. 4. Defendant's certification disclosed TaxAct Holdings, Inc., as the owner of all of the outstanding shares of Defendant, as well as several entities that are indirect owners of all of the outstanding shares of Defendant. Defendant's certification also disclosed Avantax, Inc. (f/k/a Blucora, Inc.) as the former direct owner of all of the outstanding shares of TaxAct Holdings, Inc.

19. Professional Conduct

All attorneys of record for the Parties have reviewed the Guidelines for Professional Conduct for the Northern District of California.

20. Other Matters

None.

Respectfully submitted,

Dated: June 30, 2023

By: /s/ Michele Aronson
Michele L. Aronson (*pro hac vice*)

Attorney for Defendant TaxAct, Inc.

Dated: June 30, 2023

By: /s/ Christina Tusan
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